AN INTERPRETATION OF THE ELEVENTH AMENDMENT.

A state administrative commission has taken property from a contractor under color of a contract without due process of law. The contractor's property has been merged into a state structure so that it is impossible to recover the identical property. The commission has under its control and subject to its order funds appropriated by the legislature to meet such claims as the contractor presents. It ignores his demands for payment. Thereupon he brings an action against them in their official capacities for equitable relief. The attorney general of the state appears and sets up the Eleventh Amendment. Who should prevail?

THE American Constitution may be compared to an organism with a high nervous development that enables it to adapt itself to changes in its environment or even to new environments. As such an organism is the result of evolution, so is our Federal Constitution the product of centuries of human experience in the science of government. Probably most of the great political philosophers of all ages have donated their mite to the finished product. To MONTESQUIEU we owe in part, at least, our constitutional doctrine of the separation of powers.

The division by the Constitutional Fathers of the exercise of governmental powers among the several departments of the government, and especially between State and Nation, made difficult the problem of the location in the American state of that indivisible sovereignty necessary in every state. The Federal Government does not possess it, for the doctrine of split or delegated powers is clearly sound. A great civil war and organized force decided that the local unit or individual State was not sovereign; that no State or minority of States had supreme power.

WOODROW WILSON in his "State" describes a sovereign as "a determinate person, or body of persons to whom the bulk of the members of an organized community are in the habit of rendering obedience and who are themselves not in the habit of rendering obedience to any human superior." The separation of the powers of government between the different departments of American government makes it impossible for any one department to answer the requirements of political sovereignty. It may most correctly

be said to lodge in the American electorate, for that legal branch of our government possesses ultimately "a complete freedom from legal control of any other power whatever." It is limited in its exercise of supreme political powers only by the time it takes its selected agents to execute its mandates as revealed at each election, and a continued belief in their wisdom by the necessary numerical majority. Sovereignty in America must be said to reside in the electorate, or, expressed more loosely, in the people, for Public Opinion or the Public Mind controls the electorate.

In 1793 the doctrine of State Rights or State sovereignty took its first embarrassing form when one CHISHOLM tried to sue the State of Georgia in an action of assumpsit. An immunity from suit was at once claimed on the ground of sovereignty. BLACKSTONE in his COMMENTARIES expresses the doctrine of sovereignty's immunity from suit as follows: "The law ascribes to the King the attribute of sovereignty; he is sovereign and independent within his own dominions and owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the King even in civil matters because no court can have jurisdiction over him, for all jurisdiction implies superiority of power."[1]

After due deliberation the United States Supreme Court decided the action was maintainable. The Eleventh Amendment to the Constitution was the answer of political America. MCMASTER in his "HISTORY OF THE AMERICAN PEOPLE" reports: "Alarmed at the consequences of this decision both the House and Senate hurried through the proposed Amendment without debate." The Eleventh Amendment may, therefore, be said to be an expression of the doctrine that the individual State in America is sovereign, and sovereignty in America as in England is not subject to judicial control.

Many years passed and a great civil war settled the problem of State sovereignty. Rule by a numerical majority of the Nation prevailed against the attempt of a minority to prevent progress. The results of that strife were written into law, and the Thirteenth, Fourteenth and Fifteenth Amendments express a different political theory from that expressed in the earlier Eleventh. Under the first section of the Fourteenth Amendment, the Federal Supreme Court has annulled acts of individual States passed under the so-called sovereign powers—police, eminent domain, and taxation.

The old Eleventh is still a part of the Constitution and the doctrine of State sovereignty and State immunity from suit remain to trouble the constitutional lawyer. Repudiation of the doctrine of State sovereignty has modified its original meaning in the Constitu-

[1] 1 Blackstone, Commentaries, 241-2.

tion. Judicial decisions under the Fourteenth Amendment, with which it has clashed, have limited its jurisdiction. Each section of the Constitution, however, has a proper place in the whole, and it is, therefore, necessary to construe these two together, if possible, looking at them through fundamental principles of political theory and constitutional law.

Mr. Justice SHIRAS in *Prout* v. *Starr*,[2] phrased as follows this axiom of constitutional construction when the Eleventh Amendment was pleaded in an action against administrative officers: "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, ex post facto law or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of State laws disregarding those constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry where the salutary provisions of the Fourteenth have been disregarded by State enactments. On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several states in proper cases, the immunity intended by the Eleventh Amendment."

The apparent conflict between the two amendments, evident in the case that heads this article, may be eliminated by an application of fundamental principles of sovereignty and separation of powers, and each be given the proper place in an harmonious whole. A paragraph from Book XI of the "SPIRIT OF LAWS" affords one key:

"Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator. Were it

[2] 188 U. S. 537, at p. 543.

joined to the executive power the judge might behave with violence and oppression."

Whether an action against State officers falls within the provisions of the Eleventh or Fourteenth Amendment depends upon the nature of the subject matter. If it involves a question in its nature legislative or executive, i. e. public or political, it is subject to the prohibition of the first; if it involves a question in its nature judicial, the other may be successfully invoked.

The ADAMSON EIGHT HOUR LAW may be used to illustrate the thought. In as far as it is an attempt to control hours of labor and meet public demands for social and economic justice, it is political and beyond the power of the courts. But in as far as it attempts by legislative decree to prescribe an arbitrary code of wages, taking property from one class and giving it to another, without a judicial investigation of the facts it is a usurpation by the legislature of judicial power, a denial of due process of law and unconstitutional. The nature of the law must determine the validity of the court's right of nullification.

The great MARSHALL in *Marbury* v. *Madison*[3] expressed this thought in a different application of the court's power to review acts of public officers:

"Whether the legality of an act of the head of a department be examinable in a court of justice or not must always depend on the nature of the act."

"The conclusion from the reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

The right of a citizen to sue public officers must depend also upon the nature of his remedy. That problem is clearly one of the separation of powers. A court cannot interfere with executive officers so long as they act within constitutional limits. It could not command a legislature to appropriate money to satisfy a judgment it had rendered, for the latter has control of the public purse.

When a citizen sets up a proper case and the court has power to give relief, action against public officers in their official capacities

[3] 1 Cranch 137, at pp. 165, 166.

is permissible even though public interests are at stake. In every such case the State has in reality been sued. The individual officer is before the court for his own wrong-doing, his usurpation of power, and disobedience of private or public law. But the relief is against him as an agent of the State and the decision of the court so affects the State that it cannot be said not to be a party to the action. The procedure is not dangerous, for violation of a constitutional guarantee is essential. Moreover, public policy demands efficiency and justice from administrative officers.

In *Ex parte Young*,[4] the vigorous logic of Mr. Justice HARLAN recognizes the State as a party: "How else can the State be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in their behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

The learned Justice MATTHEWS considered such an action as one against the individual officer as a wrongdoer:[5] "In the discussion of such questions, the distinction between the government of a State and the State itself is important and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, *within the sphere of its agency, a perfect representative; but outside of that, it is a lawless usurpation.* The Constitution of the State is the limit of the authority of its government, and both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. * * * *That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name.*"

Might it not logically be said that there are three parties to an action against State officers—the aggrieved citizen, the wrongdoing agent, and the State by its court? The State by its judge is enforcing that law which the other agent of the State has disobeyed.

[4] 209 U. S. 123, at p. 188.

[5] Poindexter v. Greenhow, 114 U. S. 270, at pp. 290, 291.

Its power to compel obedience depends upon the division of powers in the Constitution. If the case or the relief asked is of a political character, the citizen has chosen the wrong tribunal. He must resort to Public Opinion. If the case or relief desired is judicial, the court has the clear power to guarantee to him his constitutional rights. The Eleventh Amendment is applicable to the first; the Fourteenth, if the case be within its provisions, to the second.

A review of the important decisions of the United States Supreme Court upon the Eleventh Amendment would seem to indicate that it is not applicable to cases involving the violation of a citizen's civil rights by an officer. There are several classes of cases in which a citizen has been protected from a denial of constitutional rights by public agents.

This protection has been decreed where state officers have deprived a citizen of his liberty by an unlawful detention in custody. Here the writ of habeas corpus has been utilized to restore liberty to the prisoner. An example is *Ex parte Royall*:[6] "That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment, and to discharge him if he is restrained of his liberty in violation of the Constitution."

In another class of cases public agents have refused to surrender to a citizen property in their possession to which he claims title. *Osborn* v. *Bank*,[7] *United States* v. *Lee*,[8] *and Tindal* v. *Wesley*,[9] represent this type. The case cited at the head of this article most resembles these. The property of which the contractor has been deprived cannot be recovered because of its merger with other immovable property. Equitable relief, however, can be given against the administrative officers and the fund appropriated for the payment of such claims. The distinction between the case at hand and those cited is technical.

In each of these three cases it should be noted that the court ordered restitution of his property to the complainant citizen. The State by its officers was in possession of the property in each case and asserted title. These decisions certainly establish the principle that mere possession of property by public officers and assertion of a right to retain possession is not an objection to an action against the public agents. State officers are subject to judicial process even though the relief granted concerns the title of a State to property in its possession.

[6] 117 U. S. 241.
[7] 9 Wheaton 738.
[8] 106 U. S. 196.
[9] 167 U. S. 204.

Mr. Justice MILLER in the *Lee* case replied to the objection of the Eleventh Amendment as follows:[10]

"Looking at the question upon principle, and apart from the authority of adjudged cases, we think it is still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought into collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government professing to act in its name."

"The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation."

The recent cases in which the Fourteenth Amendment has been declared a limitation on the State's immunity from suit are those involving the regulation of rates. Mr. Justice HOLMES declared in *Prentis* v. *Atlantic Coast Line*:[11] "We may add that when the rate is fixed, a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a State, and will be the proper form of remedy." Other cases are *Reagan* v. *Farmers' Loan and Trust Co.*,[12] *Smyth* v. *Ames*,[13] *Prout* v. *Starr*,[14] and *Ex parte Young*.[15] All of these adjudications indicate the power of a court of equity to protect the constitutional rights of a citizen against governmental agencies. Granted a right to protection and a jurisdiction over the wrongdoers, a court can clearly grant any relief which its arsenal contains.

The cases in which Article I, Section 10 of the Constitution and the Eleventh Amendment have clashed illustrate a distinction between clear civil rights of a citizen and other less certain rights involving a political element not protected by constitutional guarantees. They can only be reconciled by MARSHALL'S classification of civil and political acts cited ante.

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[10] 106 U. S. 196, at pp. 218-19, 220.
[11] 211 U. S. 210.
[12] 154 U. S. 362.
[13] 169 U. S. 466.
[14] 188 U. S. 537.
[15] 209 U. S. 123.

In *Davis* v. *Gray*,[16] the court said: "When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she and her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty."

Poindexter v. *Greenhow*,[17] recognizes the same doctrine: "And how else can these principles of individual liberty and right be maintained, if, when violated the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated."

"The mandate of the State affords no justification for the invasion of rights secured by the Constitution of the United States; otherwise that constitution would not be the supreme law of the land."

Allen v. *Baltimore & Ohio R. R.*,[18] reiterates the doctrine: "Where the rights in jeopardy are those of private citizens and are of those classes which the Constitution of the United States either confers or has taken under its protection, and no adequate remedy for their enforcement is provided by the forms and proceedings purely legal, the same necessity invokes and justifies, in cases in which its remedies can be applied, that jurisdiction in equity vested by the Constitution of the United States, and which cannot be affected by the legislation of the States."

Public officers in all of these cases were restrained from doing acts which violated contracts to which the State was a party. Constitutional guarantees were violated and public officers were reprimanded for the violation. The Eleventh Amendment was ignored and properly ignored.

There is another kind of contract which the Supreme Court has refused to enforce against the objection of the State's immunity from suit. It is found in *Louisiana* v. *Jumel*,[19] *Hagood* v. *Southern*,[20] and *In re Ayers*.[21] In each of these controversies a right was recognized in the State superior to an individual's appeal for the protection of his property. They are an expression of the political power of a State to ignore the claims of some particular class of citizens when the welfare of the entire citizenship is concerned. On

[16] 16 Wall. 203, at p. 232.
[17] 114 U. S. 270, at pp. 291, 292.
[18] 114 U. S. 311, at pp. 316, 317.
[19] 107 U. S. 711.
[20] 117 U. S. 52.
[21] 123 U. S. 443.

questions of policy peculiarly within the province of the law-making body, its commands uttered in the form of laws are an expression of the will of the sovereign electorate binding on the courts themselves. The only question before the court is the nature of the act—legislative and political or civil and judicial.

The following quotation from *Louisiana* v. *Jumel*[22] illustrates the thought:

"The question, then, is whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers of the State, whose authority has been withdrawn in violation of the contract, without the State itself in its political capacity being a party to the proceedings.

"The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done."

Mr. Justice MATTHEWS in the *Hagood* case decided that there was no breach of contract and it was not a case where "personal and property rights" had been violated by public officers. The same judge in the *Ayers* case said that no contract had been violated, the subject matter was not within the jurisdiction of the court, and the remedy on this kind of a contract was not protected.

Viewed from the standpoint of public rescission the contract of *In re Ayers* is the same kind of a contract as that of the following cases: *Beer Co.* v. *Massachusetts*,[23] *Fertilizing Co.* v. *Hyde Park*,[24] *Stone* v. *Mississippi*;[25] *Illinois R. R.* v. *Illinois*.[26] It is a property right subject to restriction by an exercise of sovereignty by governmental agencies under mandates from the electorate. The grant of the privilege is repealable whenever the same public interest that called it forth demands its repeal. Sovereignty cannot be bargained away to one member or one group of the State.

The Eleventh Amendment may be said to be an expression of sovereignty's immunity from judicial control. In these United States a sovereign electorate rather than a sovereign King utters the command. When that command has crystallized into law, no

[22] 107 U. S. 711, at p. 721.
[23] 97 U. S. 25.
[24] 97 U. S. 659.
[25] 101 U. S. 79.
[26] 146 U. S. 387.

Supreme Court has a power of nullification, even though it force a reorganization of society, or introduce a new and different conception of private right. No individual or group in a democracy has a constitutional right to the perpetuity of any prevailing social, political, or economic theory. Public rights are greater than private rights. Nor is this a new doctrine. It is the right of political revolution proclaimed in the Declaration of Independence and made possible through peaceful and legal channels by the recognition in the Federal Constitution of rule by the numerical majority.

An attempt has been made in this article to apply fundamental principles of political and constitutional theory to conflicting clauses of our Constitution. The immunity of a State from suit and its officers from court process set up by the Attorney General in the case cited cannot be said to be the correct theory of the American system of government. In some cases constitutional guarantees demand that a citizen be allowed court process against public officers even though the State in its organic capacity is affected thereby. In other cases, such relief would deny to the American people the right of political revolution through legal channels, leaving sovereign powers in the hands of a few monarchs of the bench.

The Fourteenth Amendment may be said to be applicable to all cases where public officers through ignorance or malice deny to a citizen his right to life, liberty, or property. The Eleventh Amendment properly covers all cases involving political questions, especially conflicts between public and private right. In the words of MONTESQUIEU: "There is no liberty, if the judiciary power be not separated from the legislative and executive."

LEROY G. PILLING.

Providence, Rhode Island.